A

PHANG SIEW FA

v.

AW KIM SIOK

B

HIGH COURT SABAH & SARAWAK, KUCHING
LAU BEE LAN J
[ORIGINATING SUMMONS NO. 24-113-2003-II]
14 FEBRUARY 2006

C ***TRUSTS:*** *Administration of estates - Insurance policy - Insurance policies taken out by deceased while a bachelor - Plaintiff engaged to deceased at time of nomination - Whether plaintiff considered a spouse for intents and purposes of s. 166(1) of the Insurance Act 1996 - Definition of 'spouse' - Whether defendant as nominee entitled to*
D *compensation paid under insurance policies as sole beneficiary - Whether monies subject to Distribution Act 1958 - Whether monies formed part of net estate under Inheritance (Family Provision) Act 1971*

SUCCESSION: *Distribution of estate - Entitlement - Wife and child*
E *of deceased - Distribution Act 1958, s. 6(1)(g) - Maintenance of dependants - Whether to be made by way of periodical payment until plaintiff's re-marriage and child's first marriage - Inheritance (Family Provision) Act 1971, s. 3 - Duty of parent - Law Reform (Marriage and Divorce) Act 1976, s. 92 - Proceeds of fatal road accident claim -*
F *Whether plaintiff and child entitled*

The plaintiff *vide* an originating summons (encl. 3) applied for certain questions to be determined by the court. The following issues that arose were (i) whether the plaintiff and her infant child ('the child') were entitled to a reasonable provision out of the
G compensation under the late Tan Hui Guan's (deceased) insurance policies for their maintenance as dependants of the deceased pursuant to s. 3(1) of the Inheritance (Family Provision) Act 1971 ("the inheritance (Family Provision) Act") and (ii) whether the child was a child of the deceased and therefore
H entitled to claim as a beneficiary to the deceased's estate. On 13 October 2001, the plaintiff married the deceased and on 10 June 2002, the plaintiff was confirmed seven weeks pregnant. On 19 June 2002, the deceased was killed in a road accident. On 12 September 2002, the defendant (the deceased's mother) was
I appointed administratrix of the deceased's estate. Pursuant to O. 80 r. 2(3) of the Rules of the High Court 1980 ('the RHC'),

the plaintiff sought, *inter alia*, the following reliefs: (a) an order directing the defendant to transfer to the plaintiff and the child, their portion they are entitled to under s. 6 of the Distribution Act 1958 and the Distribution (Amendment) Act 1997 and (b) an order for a reasonable provision to be made out of the net estate of the deceased for the maintenance of the plaintiff and the child as dependants of the said deceased.

Held:

(1) The insurance policies were taken out by the deceased while he was a bachelor and in both the policies the deceased had named the defendant as his nominee. This court could not agree with the plaintiff's contention that since at the time of the nomination, the deceased was engaged to be married to the plaintiff, she was therefore a spouse to be, and further, that the word 'spouse' should mean also 'spouse to be'. The Insurance Act 1996 ('the Insurance Act') does not define the word "spouse''. Spouse, in the instant case, could only mean a 'legal wife'. The averments made by the plaintiff that she was engaged to the deceased does not make her a spouse for all intents and purposes of s. 166(1) of the Insurance Act. The defendant was clearly entitled to the compensation paid under the insurance polices as sole beneficiary. Therefore, the monies were not subject to distribution under the Distribution Act 1958 ('the Distribution Act') and further that the monies did not form part of the net estate under the Inheritance (Family Provision) Act. (paras 5, 6 & 7)

(2) The defendant had conceded that the share of the child, the plaintiff and the defendant to the estate of the deceased was in the proportion specified in s. 6(1)(g) of the Distribution Act ie ½, ¼, ¼ respectively. However, by virtue of s. 3(8) of the Inheritance (Family Provision) Act, the court was not bound to assume that the law relating to intestacy which in this case was the Distribution Act makes reasonable provision for the maintenance of the dependants. Based on the relevant statutory provision of s. 3 of the Inheritance (Family Provision) Act, the reasonable provision for the maintenance of the plaintiff and the child be made by way of periodical payment until the plaintiff's re-marriage and until the child's first marriage. (para 8)

(3) By virtue of s. 92 of the Law Reform (Marriage and Divorce) Act 1976, it is the duty of a parent when maintaining or contributing to the maintenance of a child, to provide the said child with accommodation, clothing, food and education subject of course to the parent's means and station in life. Having regard to the principles contained in s. 3 of the Inheritance (Family Provision) Act, the plaintiff's shortfall per month of RM1,602 should be allowed and this has been rounded to a figure of RM2,000 per month to be paid out of the net estate of the deceased. However, the estimated cost for the education needs of the child amounting to RM195,600 is covered by the ¾ share due to the plaintiff and the child out of the net estate of the deceased (which the defendant had agreed to distribute to the plaintiff and the child) amounting to RM203,825.565 which was the total sum based on the declared value of the relevant cases mentioned in the letters of administration. (para 8)

(4) The plaintiff and the child were entitled to the proportion in respect of the proceeds of the fatal road accident claim under Kuching Sessions Court in the sum of RM174,240.71. (para 9)

[Order accordingly.]

Case(s) referred to:

Re Borthwick (deceased) Borthwick & Anor v. Beauvais & Ors [1949] 1 All ER 472 ***(refd)***

Re Clarke (deceased) Clarke v. Roberts And Others [1968] 1 All ER 451 ***(refd)***

Re Ducksbury (deceased) Ducksbury v. Ducksbury & Anor [1966] 2 All ER 374 ***(refd)***

Re McNare (deceased) McNare v. McNare & Anor [1964] 4 All ER 373 ***(refd)***

Re Trott (deceased) Trott v. Miles & Ors [1958] 2 All ER 296 ***(refd)***

Sivyer v. Sivyer [1967] 3 All ER 429 ***(refd)***

Legislation referred to:

Distribution Act 1958, s. 6(1)(g)

Inheritance (Family Provision) Act 1971, ss. 3(1), (8), 4(1), (2)(c)

Insurance Act 1996, s. 166(1)(b), (2)

Law Reform (Marriage and Divorce) Act 1976, s. 92

Rules of the High Court 1980, O. 80 r. 2(3)

Inheritance (Family Provision) Act 1938 [UK], ss. 1(1), 2(1A)(c), 3(1)

Other source(s) referred to:
Malaysian Court Practice – High Court vol 2, para 86.1.1, pp 5444-5474
The Shorter Oxford English Dictionary On Historical Principles, vol II, p 2087

For the plaintiff - Arthur Lee (Sumirati Sudarjo with him); M/s Arthur Lee, Lin & Co
For the defendant - Anthony Tai; M/s Anthony Tai; M/s Anthony Tai

Reported by Suhainah Wahiduddin

JUDGMENT

Lau Bee Lan J:

[1] The plaintiff *vide* an originating summons dated 10 April 2003 (encl. 3) applied for certain questions to be determined by the court (see items (a)(1) to (8)) which by consent was agreed by the parties to be reduced to the following issues:

(1) Are the plaintiff and her infant child, Phyllis Tan Jing Joo ("the child") entitled to a reasonable provision out of the compensation under the late Tan Hui Guan's (deceased) insurance policies for their maintenance as dependants of the deceased pursuant to s. 3(1) of the Inheritance (Family Provision) Act 1971 (Act 39) ("the Inheritance (Family Provision) Act").

(2) Whether the child is a child of the deceased and is therefore entitled to claim as a beneficiary to the deceased's estate.

[2] The plaintiff seeks the following reliefs from the court pursuant to O. 80 r. 2(3) of the Rules of High Court 1980 ("the RHC"):

(1) an order requiring the defendant, as the administratrix to furnish and, if necessary, verify accounts pertaining to the estate of the late Tan Hui Guan, the deceased;

(2) an order directing the defendant, as the administratrix of the estate of the late Tan Hui Guan, the deceased, to transfer to the plaintiff and the child, the widow and the child of the late Tan Hui Guan, the deceased, their portion they are entitled to under s. 6 of the Distribution Act 1958 and the Distribution (Amendment) Act 1997;

A (3) an order for the administration of the estate of the late Tan Hui Guan, deceased;

(4) an order for a reasonable provision to be made out of the net estate of the late Tan Hui Guan (the deceased) for the
B maintenance of the plaintiff and the child as dependants of the said deceased;

(5) an order that the defendant as administratrix of the estate of the late Tan Hui Guan to commence legal action against the wrongful party who caused the death of the deceased and
C that plaintiff and the child be included as dependants and be distributed their entitled shares in the damages awarded when so awarded; and

(6) an order that the costs of this application to be paid from the
D said estate.

[3] The brief facts of the case are as follows. On 13 October 2001, the plaintiff married the deceased as per Marriage Certificate, exh. PSF1. On 10 June 2002, the plaintiff's doctor
E confirmed that the plaintiff was about seven weeks pregnant with the child of the marriage. On 19 June 2002, the deceased was killed in a road accident (exh. PSF2 – Death Certificate). On 12 September 2002, the defendant, Aw Kim Siok (the deceased's mother) was appointed administratrix of the deceased's estate *vide*
F exh. PSF3 – Letter of Administration. The deceased's estate consists of:

(i) 1/3 undivided share in Lot 4722, Block 11 Muara Tebas Land District, located at Ulu Sungai Tabuan, Kuching;

G (ii) 2,091.39 units with Public Mutual Berhad *vide* account No. 04115740-0;

(iii) cash in saving account with Public Bank Berhad RM4,231.30 (the plaintiff has no knowledge as to whether the defendant
H has withdrawn this amount);

(iv) EPF – Employees Provident Fund *vide* membership No. 71328575 – RM4,149.65 (amount of RM4,298.67 was withdrawn on 7 October 2002 by the defendant as per exh.
I PSF6);

(v) One unit of motor car – Proton Wira, registration No. QKJ5636 (transferred by the defendant to the plaintiff sometime in August 2002);

(vi) 50% share in the firm of Tan Ching Kui Transport; and

(vii) 1/7 share in the firm of Chuan Huat Transport Company.

[4] The deceased had also during his life time insured himself with:

(1) John Hancock Life Insurance (M) Berhad.

(2) Malaysia National Insurance Berhad.

("the insurance polices")

[5] The court has considered the various affidavits filed in support and in opposition and the submissions of both the learned counsel for the plaintiff and the defendant, Mr. Arthur Lee (assisted by Mdm. Sumirati bte Sudarjo) and Mr. Anthony Tai respectively. The court's findings are as follows:

Issue (1)

(1) I agree with the submission of the learned counsel for the defendant that:

(a) the insurance policies were taken out by the deceased while he was a bachelor;

(b) in both the insurance policies the deceased had named the defendant as his nominee;

(c) section 166(1)(b) of the Insurance Act 1996 (Act 553) ("the Insurance Act") clearly provide that where there is no spouse or child living at the time of the nomination the nominee is his parent, which in this case is the defendant; and

(d) section 166(1), (2) of the Insurance Act further provides "That notwithstanding any written law to the contrary, a payment under sub-section (1) shall not form part of the estate of the deceased policy owner or be subject to his debts".

(2) The court cannot agree with the plaintiff's contention that since at the time of the nomination, the deceased was engaged to be married to the plaintiff, she was therefore a spouse to be, and further, that the word "spouse" should mean also "spouse to be". The Insurance Act does not define the word "spouse". Hence, the court is constrained to rely on the plain meaning of the word by reference to the ordinary dictionary meaning; the word "spouse" means "1. a married woman in relation to her husband; a wife; a bride. 2. A married man in relation to his wife; a husband; a bridegroom" (see *The Shorter Oxford English Dictionary On Historical Principles* Vol. II at p. 2087). Therefore, I agree with Mr. Tai's submission that "spouse" can only mean a "legal wife" in the instant case.

[6] The averments made by the plaintiff that she was engaged to the deceased does not make her a spouse for all intents and purposes of s. 166(1) of the Insurance Act.

[7] Mr. Tai submitted that the circumstances of the instant case patently show that there was no spouse living at the time the deceased had nominated the defendant as the nominee and that the defendant was clearly entitled to the compensation paid under the insurance policies as sole beneficiary. I therefore agree that the monies are not subject to distribution under the Distribution Act 1958 (Act 300) (Revised-1983) ("the Distribution Act") and further that the monies do not form part of the net estate under the Inheritance (Family Provision) Act.

Issue 2

(3) The defendant has made 2 concessions:

(a) that the child is a beneficiary and is entitled to claim against the deceased's estate; and

(b) that the estate of the deceased (except for the insurance policies) are to be distributed among the plaintiff, the child and the defendant in accordance with s. 6(1)(g) of the Distribution Act (as amended by the Distribution (Amendment) Act 1004/97 which came into effect on 31 August 1997) in the following proportion:

(i) Phyllis Tan Jing Joo (child) – 1/2 share. A

(ii) Phang Siew Fa (plaintiff) – 1/4 share.

(iii) Aw Kim Siok (defendant) – 1/4 share.

(4) In the *Malaysian Court Practice – High Court Vol. 2* at para 86.1.1 pp. 5444-5474, it is stated: B

> By and large, the Act (the Inheritance (Family Provision) Act) is similar to the United Kingdom Inheritance (Family Provision) Act 1938, as amended. ... Indeed, as at the date of this annotation, there has not been any locally reported case where this Act was judicially considered. As a consequence, any guidance on the construction of the provisions of the Act and the exercise of the court's discretion must necessarily be obtained from other jurisdictions, particularly, the United Kingdom. C D

[8] Section 3(1) of the Inheritance (Family Provision) Act, *inter alia*, states:

> 3(1) Where, after the commencement of this Act, a person dies domiciled in Malaysia leaving: E
>
> (a) a wife or husband;
>
> (b) a daughter who has not been married, or who is, by reason of some mental or physical disability, incapable of maintaining herself; F
>
> (c) ...
>
> (d) ...
>
> then, if the court on application by or on behalf of any such wife, husband, daughter or son as aforesaid (in this Act referred to as a "dependent" of the deceased) is of opinion that the disposition of the deceased's estate effected by his will, or the law relating to intestacy or the combination of his will and that law, is not such as to make reasonable provision for the maintenance of that dependent, the court may order that such reasonable provision as the court thinks fit shall, subject to such conditions or restrictions, if any, as the court may impose, be made out of the deceased's net estate for the maintenance of that dependent: ... G H I

Therefore, I am in agreement with the counsel for the plaintiff that guidance from the English authorities cited by him namely, *Sivyer v. Sivyer* [1967] 3 All ER 429; *Re Clarke (deceased) Clarke v. Roberts And Others* [1968] 1 All ER 451; *Re Ducksbury (deceased) Ducksbury v. Ducksbury and Another* [1966] 2 All ER 374; *Re Borthwick (deceased) Borthwick And Another v. Beauvais And Others* [1949] 1 All ER 472; *Re Trott (deceased) Trott v. Miles And Others* [1958] 2 All ER 296; *Re McNare (deceased) McNare v. McNare and Another* [1964] 4 All ER 373 can be resorted to. In the context of this instant case, the court has to determine whether it should exercise its discretionary power to make reasonable provision for the maintenance of the plaintiff and the child who are dependants pursuant to s. 3(1) of the Inheritance (Family Provision) Act.

(5) With due respect to Mr. Tai, I do not agree with the submission of the defendant that the plaintiff is not entitled to an extension of time pursuant to s. 4(1) of the Inheritance (Family Provision) Act. In this regard, I am inclined to accept the submission of learned counsel for the plaintiff that there are circumstances affecting the administration or distribution of the estate namely:

(i) the plaintiff gave birth to her child on 1 February 2003 and was on one month confinement (see para. 21 of Phang Siew Fa's affidavit affirmed on 9 April 2003). This is a circumstance affecting the administration or distribution of the estate; and

(ii) there was negotiation between the plaintiff and the defendant as per para. 13 of Aw Kim Siok's affidavit in opposition which states that:

> I would like to say that even before the Plaintiff decided to move out from the house I had verbally proposed that she stayed at home and look after the child and that I would be responsible for all the necessary expenses for the Plaintiff and the baby including paying for the service of a baby sitter if need be. I also offered to give her cash money for her needs but the Plaintiff rejected the offer.

Here the court relies on the authorities of *Re Trott (deceased) Trott v. Mile & Ors* [1958] 2 All ER 296 and *Re McNare (deceased) McNare v. McNare & Anor* [1964] 3 All ER 373. In

the former case it was held that the child's birth is a circumstance "affecting the administration or distribution of the estate" and the court allowed the extension of time for the application. In the latter case it was held that the negotiations by her solicitors, were circumstances affecting the distribution of the estate (for the purposes of s. 2(1A)(c) of the Act of 1938 as amended which is in *pari materia* to s. 4(2)(c) of the Inheritance (Family Provision) Act) and were matters in consequence of which the limitation period of six months would operate unfairly.

(6) Section 3(8) of the Inheritance (Family Provision) Act states:

> (8) The court in considering for the purposes of sub-section (1) whether the disposition of the deceased's estate effected by the law relating to intestacy, or by the combination of the deceased's will and that law, makes reasonable provision for the maintenance of a dependent **shall not be bound to assume that the law relating to intestacy makes reasonable provision in all cases.** (emphasis added).

Based on the submissions of both the learned counsel for the plaintiff and the defendant, it is not disputed that the estate of the deceased based on exh. PSF3, *inter alia*, comprised the following:

(i) l/3rd share in Lot 4722 Block 11 Muara Tebas Land District located at Ulu Sungai Tabuan, Kuching (Area: 464.3 sq metres) (item 1).

(ii) 2,091.30 units with Public Mutual Berhad *vide* account No. 04115740-0 (item 2).

(iii) 50% share in the firm Tan Ching Kui Transport (item 6).

(iv) 1/7 share in the firm Chan Huat Transport (item 7).

(v) Proceeds of a fatal road accident claim under Kuching Sessions Court Summons No. 53-6-2002-III (SA) in the sum of RM174,240.71 now deposited in OUB Fixed Deposit Account No. 368-4-003843.

The defendant has conceded that the share of the child, the plaintiff and the defendant to the estate of the deceased is in the proportion specified in s. 6(1)(g) of the Distribution Act ie, 1/2, 1/4, 1/4 respectively. However, by virtue of s. 3(8) of

A the Inheritance (Family Provision) Act, the court is not bound to assume that the law relating to intestacy which in this case is the Distribution Act makes reasonable provision for the maintenance of the dependants. Based on the relevant statutory provision of s. 3 of the Inheritance (Family Provision) B Act and the English authorities cited by the plaintiff, I am of the view that reasonable provision for the maintenance of the plaintiff and the child be made by way of periodical payment until the plaintiff's re-marriage and until the child's marriage.

C (7) On 28 March 2005, the day fixed for ruling for the reasons above, I had informed the parties that basically the court's finding on the 1st issue is that the insurance policies do not form part of the estate of the deceased and therefore it is not subject to distribution under the Distribution Act and further D that the monies do not form part of the net estate under the Inheritance (Family Provision) Act. As to the second issue, the court was of the view that reasonable provision for maintenance of the plaintiff and the child has to be made; however, the court had difficulty with regard to the E computation in the distribution of the net estate of the deceased. Since Mr. Arthur Lee, the counsel handling the case was not present, the court was constrained to fix a new date for further clarification of the matter being 4 April 2005.

F (8) The plaintiff filed an affidavit affirmed on 1 April 2005 to reflect all the income and expenses incurred monthly and the future expenses incurred in respect of the education and subsistence of the child. The defendant chose to cross-examine the plaintiff on the contents of the affidavit and the cross-examination and re-examination were conducted on 16 G November 2005 and 25 November 2005 respectively.

(9) Learned counsel for the defendant had submitted that there should be no maintenance made for the education of the child, claim for mini-van transportation, claim for employment H of baby sitter and claims for insurance premiums on insurance polices purchased, two before marriage and one after marriage. Upon a consideration of the evidence adduced, both oral and documentary, on a balance of probabilities, I find that:

I (a) With due respect to learned counsel for the defendant, maintenance of the child surely cannot exclude the education needs of the child. In *Re Borthwick (deceased)*

(supra), the court held the terms "reasonable provision" and "maintenance" of a dependant in the context of s. 1(1) of the U.K. Inheritance (Family Provision) Act 1938 (c. 45) (equivalent to s. 3(1) of the Inheritance (Family Provision) Act) depended on the circumstances both of the dependant and of the testator; and "maintenance" did not mean "mere subsistence". Harman J at p. 475 para H opined:

> It is said that maintenance is the only thing which can be regarded. That does not mean that the court can only give the dependent just enough to put a little jam on her bread and butter. It has already been held that what is reasonable for one may not be reasonable for another. It must depend on the circumstances of the case. It certainly depends to some extent on the circumstances of the widow, but I think it must also depend on the circumstances of the testator, that is to say, whether he died a rich man or no, because the wife of a rich man is entitled to better provision for her maintenance than the wife of a poor one. Maintenance does not only mean the food a wife puts in her mouth. It also means her clothes, the house in which she lives, and the money which she is to have in her pocket, all of which is according to the means of her husband. Maintenance cannot mean only mere subsistence.

I also refer to s. 92 of the Law Reform (Marriage and Divorce) Act 1976 (Act 164) which states the following:

> Except where an agreement or order of court otherwise provides, it shall be the duty of a parent to maintain or contribute to the maintenance of his or her children, whether they are in his or her custody or the custody of any other person, either by providing them with such accommodation, clothing, food and education as may be reasonable having regard to his or her means and station in life or by paying the cost thereof.

It is to be noted that by virtue of this section, it is the duty of a parent when maintaining or contributing to the maintenance of a child, the parent is to provide the said child with accommodation, clothing, food and education subject of course to the parent's means and station in life.

A (b) The particulars stated in the statement of deficit between Income and Expenses for the child, exh. PSF5 has been proved.

(c) Having regard to the principles contained in s. 3 of the
B Inheritance (Family Provision) Act, in my judgment, the plaintiff's shortfall per month of RM1,602 should be allowed and I have rounded this to a figure of RM2,000 per month to be paid out of the net estate of the deceased. However, the estimated cost for the
C education needs of the child amounting to RM195,600 (RM129,600 + RM66,000) is in my view covered by the 3/4 share due to the plaintiff and the child out of the net estate of the deceased (which the defendant has agreed to distribute to the plaintiff and the child)
D which I have referred to above in para. 6 amounting to RM203,825.565 which is the total sum based on the declared value of the relevant assets mentioned in the Letters of Administration, exh. PSF3 exhibited by the plaintiff herself. Based on the declared value of the
E assets mentioned in exh. PSF3, the declared value of the relevant assets are:

(i) Item (1) – RM83,300

(ii) Item (2) – RM1,125.80.
F

(iii) Item (6) – RM3,995.46.

(iv) Item (7) – RM9,405.45.

Therefore, the total value of the assets ie, (i)-(v) at p. 10 is
G RM271,767.42 and 3/4 share or 75% amounts to RM203,825.565.

[9] In conclusion for the aforesaid reasons in relation to the reliefs sought by the plaintiff and the child, the court makes the following order:

H (i) there is no order as to prayer (1);

(ii) the defendant is to distribute the deceased's estate in the following proportion to the plaintiff and the child ie, 1/4 and 1/2 respectively;
I

(iii) there is no order as to prayer (3) as it is no longer applicable;

(iv) the defendant is to pay RM2,000 per month out of the net estate of the deceased for the maintenance of the plaintiff and the child as dependants of the said deceased;

(v) there is no order as to prayer (5) as it is no longer applicable save for the proportion that the plaintiff and the child is entitled to in respect of the proceeds of the fatal road accident claim under Kuching Sessions Court Summons No. 53-6-2002-II (SA) in the sum of RM174,240.71 now deposited in OUB Fixed Deposit Account No. 368-4-003843;

(vi) in respect of prayer (6) each party is to bear its own costs; and

(vii) in addition, should there be any substantial change in the circumstances of the plaintiff and the child or the defendant, they are at liberty to apply.

Order accordingly.